No. 91-1581

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,
Petitioner,

v.

GERRISH CORPORATION, doing business as
Gerrish Motors, doing business
as Scrub-a-Dub,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under Vermont law, petitioner is bound by modifications to an insurance policy that have been filed with the Vermont Department of Banking and Insurance by petitioner's authorized agent.

2. Whether, under Vermont law, the costs incurred in cleaning up pollution are considered "damages" for purposes of determining coverage under an insurance policy.

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STATEMENT

This case involves a dispute over the scope of protection afforded by an insurance policy issued by petitioner to respondent. Applying Vermont law, the district court held that respondent was entitled to coverage for costs associated with gasoline leakage, and the court of appeals affirmed.

1. *The Insurance Dispute.* The controversy at issue here arose out of the leakage of gasoline from underground storage tanks located at a car wash and gasoline station owned by respondent. In 1985 the Vermont Agency of Environmental Conservation notified respondent that the gasoline—which had spilled more than a dec-

ade before—was causing environmental damage to nearby property and to the Ottauquechee River.[1] Pet. App. 4-5, 23-24. The agency then proposed to respondent alternative courses of action: either conduct a cleanup itself or else reimburse the State for the cost of a state-directed cleanup. Pet. App. 5, 24.

Faced with this potential liability, respondent sought to claim indemnification under its Unicover III insurance policy with petitioner. That effort proved unsuccessful. Petitioner took the position that it had no obligation under the policy for liability of this type. Pet. App. 8, 25. In doing so, it relied on various exclusions contained in the Unicover III policy, including exclusions for "INJURY caused by the dumping, discharge, or escape of irritants, pollutants or contaminants" and for "INJURY caused by the discharge, release, or escape of any petroleum substance into or upon any body of water or water course . . . ." Pet. App. 5-6, 26-28.[2]

The Unicover III policy, with the exclusion for pollution damage, had previously been filed by respondent and approved by the Vermont Department of Banking and Insurance (VDBI) in 1980. In 1982, however, petitioner had given authorization to the Insurance Services Office (ISO) to act on its behalf before the VDBI. Pet. App. 7, 29.[3] The authorization specifically provided that VDBI

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[1] The court of appeals noted that "[p]rior to its discussions with Vermont, [respondent] was unaware of the existence of any underground contamination [from the car wash and gas station]." Pet. App. 5.

[2] Petitioner also asserted that, although it was obligated to pay "damages" incurred by respondent, the potential costs of a clean-up were not damages. Pet. App. 15, 39.

[3] Although the courts below referred to ISO as the "Insurance Services Organization," the authorization was, in fact, given to the Insurance Services Office, and we will use that name here. The court of appeals described ISO as "an insurance rating organization comprised of insurance companies." Pet. App. 7. It noted: "ISO provides various services for its members, including the drafting

might accept filings by ISO relating to, among other things, "Rules and Rates" and "Policy Forms and Endorsements." Pet. App. 29. In April, 1984, responding to VDBI concerns about exclusions for pollution, ISO filed a "Vermont Pollution Liability Exception Endorsement," which deleted so-called "pollution exclusions" from insurance policies written in Vermont.[4] Pet. App. 7, 31. The ISO filing stated that "these changes are applicable to all policies written on or after July 1, 1984." Pet. App. 32.

The endorsement filed by ISO was approved by VDBI in May 1984. Pet. App. 32. The following month, ISO notified its members (including petitioner) of the endorsement and its effective date, advising that the endorsement "must be attached to all policies providing general liability coverage in Vermont unless the coverage is specifically excluded." Pet. App. 7, 32. Three months later, while the endorsement was still in effect, petitioner issued to respondent the policy that forms the basis for this lawsuit. Pet. App. 8.

2. *The Lawsuit.* The lawsuit basically involved two questions with respect to the scope of coverage provided by petitioner: first, whether the Unicover III policy in its basic form provided coverage and, second, whether, if it did not, it had been amended by the endorsement filed by ISO. The district court ruled for petitioner on the first question, but for respondent on the second. It thus held that respondent was entitled to claim coverage under the policy.

The district court began by noting that, at the time of the filing of the endorsement, "ISO was authorized to act as [petitioner's] agent by the October 1, 1982 filing with VDBI." Pet. App. 43. It then concluded that the endorse-

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and filing of insurance forms with various state insurance departments." *Id.*

[4] At the same time ISO filed two Pollution Exclusion Endorsements, which could be used to exclude coverage for pollution under certain circumstances. Pet. App. 31.

ment applied not just to ISO forms but to the Unicover III policy as well, pointing out that petitioner had neither limited the initial authorization to ISO to file on its behalf nor, after the endorsement had been filed, notified VDBI that it did not intend to be bound by it. Rejecting an argument that the endorsement filed by ISO did not fit the general structure of the Unicover III policy, the court observed that the filing had been "by [petitioner's] agent" and that petitioner "is bound by the acts of its express agent done in furtherance of the agency." Pet. App. 47, 48.

The district court, for much the same reasons, dismissed an argument by petitioner that it could not be held responsible because it did not have knowledge of the VDBI policy against pollution exclusions—the policy that led to the filing of the endorsement by ISO. Again, the court stated that "[f]or purposes of dealing with VDBI, ISO had an agency relationship with [petitioner]," Pet. App. 49, and it found that, even absent actual knowledge, petitioner thus would be "charged with constructive knowledge of the information, which was known to ISO." *Id.* Moreover, the court found that petitioner was fully aware of the action taken by ISO to address the issue of pollution coverage. (The court relied, in part, on contemporaneous statements by a Vice-President of petitioner, which took the position that "these [ISO] endorsements are MANDATORY. . . . [W]e can't delete them or charge for the coverage without the insured's permission." Pet. App. 50.) Given that petitioner knew of the actions of its agent, and given that petitioner did nothing to disavow them, the court held that the filings by ISO "became a part of all Universal policies issued in Vermont" during the period relevant to the lawsuit. Pet. App. 50.[5]

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[5] The court also rejected a claim by petitioner that, in requiring deletion of pollution exclusions, VDBI was acting outside of its authority. The court noted that ISO had entered into voluntary negotiations with VDBI and that petitioner was "bound by ISO's actions on its behalf." Pet. App. 52.

The district court also found against petitioner on another point: whether clean-up costs or "response" costs are "damages" covered by the policy. The court noted that other courts had come out different ways on this general question and found no Vermont cases directly on point. However, looking at a Second Circuit case applying New York law, as well as general principles of Vermont law, the court stated: "[T]his Court believes that the Vermont Supreme Court would find that pollution clean-up costs are damages under the policy in this case, and we so hold." Pet. App. 40. *See Avondale Indus. Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989), *cert. denied*, 496 U.S. 906 (1990).

The court of appeals affirmed. Like the district court, it concluded that the Unicover III policy—prior to modification—did not cover the claim for which respondent had sought protection. Pet. App. 10. But the court of appeals also agreed with the district court "that the policy was amended by [petitioner's] agent, ISO, to provide coverage for this claim." Pet. App. 10-11.

The court of appeals stated that the basis for its holding was "rooted in the law of agency." Pet. App. 11. After reviewing Vermont law on the creation of principal-agent relationships, the court stated that "[i]n the instant case ISO clearly acted on behalf of [petitioner] with [petitioner's] knowledge and with the authority conferred by [petitioner]. In sum, ISO was [petitioner's] agent and was empowered to bind [petitioner]." Pet. App. 12. Although petitioner again argued that the actions by ISO did not affect its Unicover III policy with respondent, the court, applying "general rules of contract and insurance law," disagreed. It held that "[t]he pollution endorsement filed by ISO affected all policies issued after July 7, 1984, including the Gerrish policy." Pet. App. 13.

The court of appeals further held that clean-up or response costs were "damages" covered by the policy. Al-

though it noted that there were "no cases interpreting Vermont law" on this exact point, Pet. App. 16, it found "some guidance" in Vermont law providing that "policies are to be interpreted in favor of complete coverage." *Id.* It went on to observe that "[i]n this instance, construing the term 'damages' in favor of [respondent] results in coverage under the policy," Pet. App. 17, and thus concluded that petitioner was responsible for the indicated coverage. The court of appeals stated its belief "that the Vermont courts would reach the same conclusion." *Id.* (citing *Bean v. Sears, Roebuck & Co.*, 129 Vt. 278, 282, 276 A.2d 613, 616 (1971)).

ARGUMENT

This case does not, as petitioner would have it, involve a dispute over the proper extent of due process rights to be afforded to petitioner; rather, it involves nothing more than a dispute over application of the Vermont law of agency. In deciding that petitioner was responsible for particular coverage under its insurance policy with respondent, the courts below both concluded that ISO had acted as the agent for petitioner in making certain filings with VDBI and that petitioner had knowledge of, and was bound by, those filings. As a result, the courts found no basis for petitioner to evade responsibility for coverage on the theory that VDBI had imposed changes unilaterally and without notice. Those determinations—a mix of factual findings and interpretations of state law—do not merit further review.

I. THE COURTS BELOW PROPERLY CONCLUDED THAT, UNDER VERMONT LAW, PETITIONER WAS BOUND BY THE ACTS OF ITS AGENT

The gist of the complaint now made by petitioner is that VDBI modified the terms of its Unicover III insurance policy without affording petitioner the notice and hearing required by due process. Pet. 18-27. But this argument was rejected by the courts below, not because

they concluded that VDBI was under no legal obligation to provide due process, but because they determined that ISO, the agent for petitioner, had actually agreed to the modifications. In the final analysis, it is *that* holding to which petitioner objects and towards which much of its petition, directly and indirectly, is addressed. *See* Pet. 5-10, 13-15, 22-23, 24-25.

There is no reason whatever to review that holding. First of all, it is simply a matter of Vermont law applied to the particular facts of this case. In holding petitioner responsible under its policy with respondent, the courts below decided that ISO was acting as an agent for petitioner in filing the 1984 endorsements deleting pollution exclusions from Vermont policies and that the endorsements applied to Unicover III policies as well as policies issued on ISO forms. These decisions raise no issues of federal law, and, once they are accepted, the due process claims asserted by petitioner effectively fall by the wayside.

The holdings below are also correct. For all petitioner's efforts to claim otherwise, the plain fact is that petitioner gave ISO extremely broad authorization to make filings with VDBI on its behalf. In dealing with VDBI concerns about pollution exclusions, ISO undertook to file endorsements deleting such exclusions unless they were the subject of separate bargaining between insurer and insured. Notified of that action, petitioner gave no indication to VDBI that it considered the endorsements inapplicable to its Unicover III policies, nor did it otherwise disassociate itself from the acts of its agent.[6] The courts below thus properly concluded that, under Vermont law, the endorse-

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[6] Beginning in April 1985, petitioner did file proposed endorsements with VDBI that directly addressed the issue of pollution exclusions. *See* Pet. App. 33-35. At the time of the issuance of the policy in this case, however, petitioner had neither filed its own endorsements nor indicated any inclination not to be bound by those filed by ISO.

ments modified the terms of coverage under the Unicover III policy.

Given these circumstances, the cases cited by petitioner (Pet. 18) are wholly beside the point. In none of the due process cases relied on—cases such as *Hannah v. Larche*, 363 U.S. 420 (1960), *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), and *Goldberg v. Kelley*, 397 U.S. 254 (1970)—had the state had any dealings with, much less reached agreement with, an agent of the person deprived of property. To the contrary, the basis of the constitutional claim in each case was that the State had acted without giving the property owner *any* right to be heard, either directly or through a representative. That is a very different matter from the sort of claim made here: that petitioner is dissatisfied with the actions taken by its agent and now wishes to disavow them.[7]

Nor can petitioner, relying on *Bouie v. Columbia*, 378 U.S. 347 (1964), turn this into a due process case by suggesting that the decision below represents some extraordinary departure from preexisting Vermont law. Even assuming that *Bouie* applies outside the particular context of *ex post facto* laws—one in which lawful conduct is made criminal after the fact—there was no retroactive change of law here. As petitioner appears to recognize (Pet. 18-27), Vermont law provides, and at all relevant times has provided, for notice and an opportunity to be heard before approval of insurance contracts is withdrawn. But nothing in Vermont law, and certainly nothing in the due process clause, bars the State from nego-

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[7] The analogy offered by petitioner (Pet. 22) readily points up this difference. It is, of course, true that notice to one householder about his building plans will not necessarily affect the building plans of his neighbors, for the obvious reason that there is no legal relationship between the neighbors. But, if the first householder is authorized to act as agent for all the neighbors, and does so act on their behalf, then the neighbors are properly deemed to have notice of, and be bound by, his actions.

tiating changes in approved contracts with an agent for the insurance carrier. That is all that happened here.

II. THE COURTS BELOW CORRECTLY HELD THAT CLEAN-UP COSTS ARE DAMAGES UNDER VERMONT LAW

The second issue presented by petitioner—whether clean-up costs are "damages" under the policy issued by petitioner—is solely a matter of state law. The courts below each made clear that, in addressing this question, they were attempting to apply Vermont law as the Vermont courts would do. *See* Pet. App. 17, 40. There is no need for this Court to second-guess their conclusion that, under Vermont law, coverage does exist.

Petitioner is correct that federal courts have found themselves divided over the proper answer to this recurring question. See Pet. 28-29 and notes 11-13. But that division does not make the case appropriate for review. The variety of results among the federal courts arises, not from disagreement over interpretation of a point of federal law, but from the application of different state laws tending in different directions. Far from being a condition that calls for correction by this Court—presumably by a single rule to be imposed on all 50 states—this lack of uniformity is simply a natural consequence of our federal system. Under the law of Vermont, clean-up costs are "damages" for purposes of defining insurance coverage, and petitioner has no grounds for complaint that the law of other states may be different.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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